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Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

FREDY HUGO PENA-MURIEL,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Court of Appeals erred in holding that the Board of Immigration Appeals lacked jurisdiction to entertain petitioner's motion to reopen.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fredy Hugo Pena-Muriel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

CITATION TO OPINIONS BELOW

The decision of the Immigration Judge and the Board of Immigration Appeals are unpublished, Matter of Pena-Muriel, A30-663-990. The opinion of the United States Court of Appeals for the First Circuit in this case, dated June 13, 2007, is published at 489 F.3d 438 (1st Cir. 2007). The petitions for rehearing and for rehearing en banc were denied on October 24, 2007 and are published at 510 F.3d 350 (1st Cir. 2007).

STATEMENT OF JURISDICTION

The Court of Appeals decided the petition for review on June 13, 2007, and denied the petitions for rehearing and for rehearing en banc on October 24, 2007. On January 9, 2008, Mr. Justice Souter extended the time for filing a petition for a writ of certiorari to and including March 22, 2008. The Court of Appeals had jurisdiction to review the decision of the Board of Immigration Appeals pursuant to Immigration and Nationality Act ("INA") §242, 8 U.S.C. §1252, as amended by the Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) (RIDA). This Court has jurisdiction to review the judgment on a writ of certiorari pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

(Former) 8 U.S.C. § 1105a(c) (eliminated by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996))

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order...

8 C.F.R. § 1003.23(b)(1)

> ...A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his departure from the United States...

United States Constitution, Article V

> No person shall be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioner is a native and citizen of Bolivia who entered the United States as a lawful permanent resident on September 27, 1970. He was convicted of Domestic Assault in the Providence, Rhode Island Sixth District Court in violation of R.I. Gen. Laws § 11-

5-3 and § 12-29-5 on February 19, 1997. Mr. Muriel received a one year suspended sentence.

Mr. Muriel was placed in removal proceedings and ordered removed on August 14, 1997, pursuant to INA § 237(a)(2)(E)(i) [8 U.S.C. § 1227 (a)(2)(E)(i)] as an alien convicted of a domestic violence offense. He did not appeal the order, and departed the United States. On March 22, 2002, Mr. Muriel's plea was vacated by the Rhode Island District Court in Providence, Rhode Island, when the alleged victim of the domestic assault recanted her allegations. On March 27, 2002, the prosecution dismissed all charges against Mr. Muriel.

On May 16, 2002, Mr. Muriel filed a motion to reopen his deportation proceedings based on the vacatur of his conviction. The Immigration Judge denied the motion due to lack of jurisdiction, basing his decision on 8 C.F.R. § 3.23(b)(1) (now 8 C.F.R. § 1003.23(b)(1)). The Board of Immigration Appeals issued a summary affirmance on February 6, 2003.

Mr. Muriel petitioned the United States District Court for the District of Massachusetts for a writ of habeas corpus. The petition was transferred to the First Circuit Court of Appeals as a petition for review pursuant to the May 11, 2005 enactment of the Real ID Act. The Court of Appeals denied the petition for review on June 13, 2007, and petitions for rehearing and for rehearing en banc on October 24, 2007. This petition for writ of certiorari follows.

STATEMENT OF THE FACTS

Petitioner Fredy Hugo Pena-Muriel (Muriel) is a native and citizen of Bolivia who entered the United States as an immigrant in 1970, at 16 months of age. Thereafter, he resided as a lawful permanent resident of the United States for 27 years. His family, including his child, mother, father, and two brothers are citizens of the United States, and he has dozens of other family members residing in the United States as citizens or lawful permanent residents.

On February 19, 1997, Mr. Muriel was convicted of domestic assault in the Providence, Rhode Island Sixth District Court, in violation of R.I. Gen. Laws §§ 11-5-3 and 12-29-5. He was sentenced to a one year term of imprisonment, which was suspended. The conviction was obtained as a result of the false allegation of the complaining witness, which was later recanted. As a result of this conviction, Mr. Muriel was placed in removal proceedings through the issuance of a Notice to Appear (NTA) dated July 17, 1997, charging him with being deportable as an alien convicted of a crime of domestic violence and an aggravated felony, pursuant to INA §§ 237(a)(2)(E)(i) and 237(a)(2)(A)(iii). On September 15, 1997, Mr. Muriel was ordered deported.

In March, 2002, Mr. Muriel filed an application for post-conviction relief in the Sixth District Court, when the complaining witness came forward and recanted her prior allegations. The court granted the application on March 22, 2002, and the criminal charge was subsequently dismissed.

Mr. Muriel then filed a motion to reopen his removal proceedings on May 8, 2002. On June 29, 2002, the motion was denied by an Immigration Judge (IJ). The IJ's decision was based exclusively on 8 C.F.R. § 3.23(b)(1) (now 8 C.F.R. § 1003.23(b)(1)), which states, in relevant part, that "a motion to reopen or reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States." On February 6, 2003, the Board of Immigration Appeals (BIA) summarily affirmed the IJ's decision, in an affirmance without opinion.

On May 28, 2003, Mr. Muriel filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts, No. 03-1984-MEL, seeking review of the BIA's decision. On June 21, 2005, the case was transferred to the United States Court of Appeals for the First Circuit as a petition for review pursuant to § 106(c) of the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (RIDA). The Court of Appeals denied the petition for review on June 13, 2007 and petitions for rehearing and for rehearing en banc on October 24, 2007. This petition for writ of certiorari follows.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE BOARD OF IMMIGRATION APPEALS LACKED JURISDICTION TO ENTERTAIN PETITIONER'S MOTION TO REOPEN

Petitioner Fredy Muriel, a native and citizen of Bolivia, was admitted to the United States as a lawful permanent resident alien in 1970, when he was one year and 4 months old. On August 14, 1997, after having lived in the United States for 27 years, he was ordered removed on the basis of a conviction for the offense of Domestic Assault, in violation of R.I. Gen. Laws §§ 11-5-3 and 12-29-5. He did depart the United States, and has been living abroad since that time.

Mr. Muriel's conviction, however, was based on fraudulent allegations that were later recanted by the complaining witness in a sworn affidavit. His conviction was duly vacated on March 22, 2002, and all charges against him were dismissed. Because the conviction that had formed the basis for the order to remove him to Bolivia in the first instance had been vacated, Mr. Muriel filed a motion to reopen his immigration proceedings. An Immigration Judge, however, denied the motion on the basis of 8 C.F.R § 3.23(b)(1) (now 8 C.F.R. § 1003.23(b)(1)), stating that "a motion to reopen may not be filed by or on behalf of a person who is the subject of removal, deportation or exclusion proceedings subsequent to his departure

from the United States."[1] The Board of Immigration Appeals issued a summary affirmance of that decision.

A. Because Mr. Muriel's Conviction Has Been Vacated on the Merits, It Cannot Properly Serve as the Basis For Removal

The vacatur of the underlying conviction that formed the basis of Mr. Muriel's 1997 deportation proceedings was on the merits, resulting in a clear defect in those proceedings which requires reopening. The First Circuit has held that "the overturning of a conviction upon which deportability was premised is an appropriate basis for reopening administrative proceedings." De Faria v. INS, 13 F.3d 422, 423 (1st Cir. 1993).

In De Faria, the Court of Appeals cited a number of cases approvingly for the proposition that administrative proceedings are appropriately reopened when the conviction upon which deportability is based is overturned. Id. at 423-24. See also Haghi v.Russell, 744 F. Supp. 249, 251 (D. Col. 1990) (holding that "[i]f there [was] no conviction, there [was] probably [also] no longer a basis for a deportation order ...", and remanding the case back to the BIA for reconsideration of the motion to reopen in light of the new evidence); Becerra-Jimenez v. INS, 829 F.2d 996, 1001 (10th Cir. 1987) (holding that evidence not available at the time of Petitioner's initial removal hearing, including the expungement of two of his

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[1] Matter of Pena-Muriel, A30-663-990, June 29, 2002, Decision of the Immigration Judge at 2.

criminal convictions, served as a basis for ordering the BIA to reopen proceedings on remand to hear evidence). One of the cases cited by the First Circuit, Wiedersperg v. INS, 896 F.2d 1179 (9th Cir. 1990), found that the BIA had abused its discretion in refusing to reopen administrative proceedings after petitioner's conviction had been vacated. "Where Congress has made deportability depend upon a state's action in convicting an alien of a state-defined crime, it offends no sense of symmetry to hold that a state's action vacating and totally nullifying that conviction should render the deportation not legally executed." Wiedersperg, 896 F.2d at 1182.

The position that the vacatur of a conviction that supports an order of deportation is a valid basis for reopening administrative proceedings is held by the Board of Immigration Appeals as well as all but one of the circuit courts. The BIA routinely terminates removal proceedings when the conviction upon which the charge was based is vacated. See Matter of Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1380 (BIA 2000). There, the BIA held specifically that after the conviction was properly vacated, there was "no current basis to find the respondent removable as charged." Rodriguez-Ruiz, 22 I. & N. at 1380. A vacatur that has been granted (1) on the merits, and (2) not as a result of a state rehabilitative measure, goes directly to the validity of any charge of deportability based on the vacated conviction, and must be considered an appropriate ground for a motion to reopen those proceedings. See, e.g., Alim v. Gonzalez, 446 F.3d 1239, 1244 (11th Cir 2006) (stating that to continue to consider a conviction that was vacated on appeal a conviction for immigration purposes is "so foreign, so

antithetical, to the longstanding principles underlying our criminal justice system and our notions of due process that we would expect Congress to have spoken very clearly if it intended to effect such results. It has not, however, done so"); Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1129 (10th Cir. 2005) ("In sum, the treatment of vacated convictions is now fairly well-settled. Notwithstanding the Fifth Circuit's tenuous adherence to a categorical disregard of all vacaturs ... 'the rest of the nation' has [held a properly vacated conviction cannot support a charge of deportability]").

In Cruz v. Attorney General of the United States, 452 F.3d 240 (3rd Cir. 2006), the Ninth Circuit noted that even untimely motions to reopen are routinely granted, pursuant to the agency's sua sponte authority to reopen, where based on properly vacated convictions. Id. at 250 ("Should the Board determine on remand that Cruz is no longer 'convicted' under the INA, we would expect it to reopen his proceedings despite the untimeliness of his motion, as it has routinely done in other cases where a conviction was vacated under Pickering, or at least explain logically its unwillingness to do so.").

Mr. Muriel sought to have his conviction for domestic assault vacated following notification that the complaining witness had recanted her allegations. As a result of the new information and a dismissal of all charges against Mr. Muriel by the prosecution, the court granted the motion to vacate his conviction. According to De Faria, and authority cited therein, Mr. Muriel is entitled to have his administrative proceedings reopened in light of the new evidence that his underlying conviction has been vacated. Moreover,

the vacatur of the conviction is clearly effective for immigration purposes; the conviction was (1) granted on the merits, as the result of the revelation that the allegations that had garnered his conviction had been fraudulently offered, and (2) not on the basis of a rehabilitative measure. See Matter of Pickering, 23 I. & N. Dec. 621 (BIA 2003). Just as there were no grounds for Mr. Muriel's conviction, there are no grounds for his order of deportation. The validity of the deportation proceedings which resulted in Mr. Muriel's removal from the United States has been fatally undermined. The sole ground upon which his removal was based has been vacated. In order to correct the serious collateral consequences of his erroneous conviction, his removal proceedings must be reopened.

B. 8 C.F.R § 1003.23(b)(1) Does Not Bar Reopening Where The Motion to Reopen Is Based Upon A Vacated Conviction

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, Div. C, 110 Stat. 3009-626 (1996) (IIRIRA), INA § 106(c), 8 U.S.C. § 1105a(c) governed circuit court jurisdiction to review motions to reopen. The statute read, in pertinent part, that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien ... has departed from the United States after the issuance of the order." Before the 1996 enactment of IIRIRA, the circuits were split as to how to interpret the language of §106(c), specifically the word "departed". A number of circuits held that "departed" did not refer to those departures that were not legally executed or that were effected in violation of due process. See Mendez v. INS, 563 F.2d 956 (9th Cir.

1977); Estrada-Rosales v. INS, 645 F.2d 819 (9th Cir. 1981); Juarez v. INS, 732 F.2d 58 (6th Cir. 1984); Camacho-Bordes v. INS, 33 F.3d 26, 28 (8th Cir. 1994) (holding that there is jurisdiction to "review an order of deportation ... if the record reveals a colorable due process claim"); Marrero v. INS, 990 F.2d 772, 777 (3rd Cir. 1993) (same). Other circuits, including the First Circuit, have held that the language should be interpreted to provide an absolute bar to jurisdiction after an alien had departed the United States, regardless of the circumstances. See Baez v. INS, 41 F.3d 19 (1994); Roldan v. Racette, 984 F.2d 85, 90 (2d. Cir. 1993); Umanzor v. Lambert, 782 F.2d 1299 (5th Cir. 1986); Saadi v. INS, 912 F.2d 428, 428 (10th Cir. 1990).

In Mendez, the Petitioner was deported after his underlying conviction had been vacated, and without having had an opportunity to contact his counsel of record. Appellant's attorney filed a motion for reconsideration with the BIA, which was denied on jurisdictional grounds because Mendez had already "departed" the United States. The Ninth Circuit reversed, ordering the INS to readmit Mr. Mendez and grant him the same status that he had held prior to the defective deportation, in order to allow him to pursue appropriate administrative remedies. Id. at 959. In reaching its opinion, the court reasoned that it had "difficulty viewing appellant as falling within the statutory definitions of one who 'has departed the United States' or who has 'been deported in pursuance of law.'" Id. at 958.

The Ninth Circuit expounded on its Mendez holding in Estrada-Rosales v. INS, 645 F.2d 819 (9th Cir.

1981). There, the alien's conviction was vacated after his deportation, and the Board of Immigration Appeals denied his motion to reopen based upon the post-departure bar. In granting the petition for review, the court stated that "the regulation in turn is taken from the provision in the Immigration and Nationality Act which precludes judicial review of an order once an alien has 'departed' from the United States [8 U.S.C. § 1105a(c)]." Id. at 820. The court held that a deportation based upon an invalid conviction is "not 'legally executed'" and therefore "cannot now serve as a legitimate ground for deportation so as to foreclose reopening." Id. Similarly, in Wiedersperg v. INS, 896 F.2d 1179 (9th Cir. 1990), the court determined that it had jurisdiction to review the denial of the motion to reopen (based on the post-departure bar) where the motion was based on the vacatur of a conviction which occurred subsequent to the alien's deportation. Again noting that "the regulation takes its language from and operates parallel to 8 U.S.C. § 1105a(c)," the court affirmed the Mendez holding that the jurisdictional bars both to judicial review, pursuant to §1105a(c), and to reopening, pursuant to 8 C.F.R § 3.2, do not apply where the departure was not a "legally executed," one. 896 F.2d at 1180. The court determined that a deportation based upon a conviction which was later vacated on the merits is not "legally executed," and 8 C.F.R. § 3.2 therefore did not bar reopening. The holding has been extended to post- IIRIRA cases in which a conviction was vacated subsequent to the alien's departure from the United States. See Cardoso-Tlaseca v. Gonzales, 460 F.3d 1102, 1106 (9th Cir. 2006) (deportation based upon an invalid conviction which was vacated subsequent to deportation not "legally executed"; therefore, defective

deportation may be reopened after Petitioner's departure). The Third, Sixth, and Eighth Circuits have agreed that the courts have jurisdiction to review the colorable due process claim of an alien whether or not his deportation has already been effected. Marrero, 990 F.2d at 777; Juarez, 732 F.2d at 58; Camacho-Bordes, 33 F.3d at 28.

In its disagreement with these holdings in Baez v. INS, 41 F.3d 19 (1st Cir. 1994), the First Circuit found the prohibition on judicial review of an order of deportation where the alien had departed from the United States to be "absolute," reflecting "Congress's determination to eliminate repetitive and unjustified appeals." 41 F.3d at 22. The court determined that the "plain language of the statute prohibits judicial review of a deportation order once the order has been executed." Id. at 24.

As a result of the enactments in IIRIRA and RIDA, this statutory prohibition no longer exists. When Congress enacted § 1252(d), it eliminated the language that had previously existed in § 1105a(c) which barred judicial review after an alien had departed the United States. Section 1252 ("judicial review of orders of removal") replaced the pre-existing jurisdictional provisions; notably, the language regarding post departure judicial review was removed from the statute completely. Whatever the correctness of the First Circuit's decision in Baez may have been, it is no longer viable with the elimination of §1105a(c). Thus, any continued reliance on Baez as support for the continuing validity of the regulation is inappropriate.

C. 8 C.F.R § 1003.23(b)(1) Is No Longer Valid, as it Conflicts With 8 U.S.C. § 1252

The elimination of the prohibition on judicial review as a result of an alien's departure was an integral part of an overall goal of balancing more effective removal procedures with the demands of due process. Reinstatement of judicial review despite an alien's departure is consistent with this goal, as it reduces the potential for delay in executing a removal order while protecting the due process rights of the alien.

> The permanent rules now give courts the opportunity to make decisions on stay of removal without the overriding concern that removal will end the case. Effective use of that opportunity should further decrease the incentive to bring insubstantial claims for purposes of delay. Despite the seeming paradox, elimination of the departure rule facilitates both streamlined enforcement and judicial review.

Gerald L. Neuman, Symposium: Jurisdiction and the Rule of Law After the 1996 Immigration Act, 113 HARV. L. REV. 1963, 1995-97 (2000).

Thus, it is now well-settled that an alien's departure does not eliminate judicial review. See Leitao v. Reno, 311 F.3d 453 (1st Cir. 2002). See also Tapia-Garcia v. INS, 237 F.3d 1216, 1217 (10th Cir. 2001)("deportation no longer forecloses judicial review"); Moore v. Ashcroft, 251 F.3d 919, 922 (11th Cir. 2001) ("removal from the United States does not render [the petitioner's] case moot"); Ngarurih v.

Ashcroft, 371 F.3d 182, 192-93 (4th Cir. 2004) (8 U.S.C § 1252 "does not purport to cut off appellate jurisdiction once an alien leaves the country," and that "an alien may continue to prosecute his appeal of a final order of removal even after he departs the United States"); Patel v. Ashcroft, 378 F.3d 610, 612-13 (7th Cir. 2004) (holding that circuit court jurisdiction is barred after an alien departs the country only if the petition was filed under former § 1105a(c) or IIRIRA's transitional rules).

Furthermore, the REAL ID Act of 2005 further amended the jurisdictional provision, again broadening the jurisdiction for the courts of appeals to review final orders of removal when constitutional questions or questions of law remain. See Papageorgiou v. Gonzalez, 413 F.3d 356, 358 (3rd Cir. 2005) (holding that "Congress evidenced its intent to restore judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders.") See also Boakai v. Gonzalez, 447 F.3d 1, 4 (1st Cir. 2006) (noting that the REAL ID Act broadened the jurisdiction of the courts of appeals to hear petitions for review filed by aliens convicted of aggravated felonies seeking relief under the Convention Against Torture). In sum, these statutory revisions evidence Congress' intent to organize and streamline the judicial review procedures, while at the same time clearly recognizing the necessity to protect noncitizens' due process rights to have their claims heard.

The BIA erred in relying on 8 C.F.R § 1003.23(b)(1) to deny petitioner's motion to reopen for lack of subject matter jurisdiction, because that regulation is

inextricably linked to a statute that has since been substantially amended, and no longer includes any mention of restrictions on post-departure jurisdiction. Thus, the regulation itself is no longer valid, as it is in clear conflict with 8 U.S.C. § 1252. Before IIRIRA was enacted, INA § 106(c), 8 U.S.C. § 1105a(c) governed circuit court jurisdiction to review motions to reopen. It read, "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien ... has departed from the United States after the issuance of the order." The Department of Justice duly passed regulations in conformity with the statute. 8 C.F.R. § 1003.2(d) (pertaining to the Board of Immigration Appeals) and § 1003.23(b)(1) (pertaining to immigration judges) both state that "[a] motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject matter of exclusion, deportation or removal proceedings subsequent to his or her departure from the United States."

These regulations forbid an alien from filing a motion to reopen, and ostensibly forbid the courts from considering such a motion, after the petitioner has departed the United States. The regulations were adopted in the same year as the enactment of §1105a(c), and contain the exact language of the statute. Now, there is no such language in §1252; yet the regulation has not been changed to reflect the new mandate from Congress. The Ninth Circuit held in Wiedersperg that 8 C.F.R. § 3.2 (now redesignated as §1003.2(d)) "takes its language from and operates parallel to" §1105a(c). 896 F.2d at 1180, n. 2. That the court equated the language of the regulation to the

language of the statute indicates the former's dependence on the latter for its relevance.

In its decision below, the First Circuit rejected the position that the elimination of §1105a(c) clearly expressed Congressional intent to invalidate the regulatory departure bar of 8 C.F.R. § 1003.23(b)(1) on motions to reopen. It further determined that the regulation was a reasonable interpretation of the statute, under the second step of Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984). The court concluded that the statutory change permitting post-departure appeals did not "remotely" support the argument that Congress also intended to permit post-departure motions to reopen.

The First Circuit's conclusion is contrary to the Congressional intent to streamline removal proceedings, while at the same time protecting the due process rights of aliens. Permitting noncitizens who have been deported to continue to press their claims subsequent to their departure eliminates the incentive to file frivolous appeals for the purpose of remaining in the United States. At the same time, those with meritorious claims are able to have them fully litigated, which vindicates due process concerns. This rationale is equally applicable to the motion to reopen context. It is not a reasonable interpretation, in light of the elimination of §1105a(c), to permit valid post-departure claims to proceed on judicial review, yet disallow similarly meritorious post-departure claims based solely on the post-departure regulation. The

regulation is in direct conflict with the amended statute, and must be invalidated.[2]

D. Mr. Muriel's Wrongful Deportation Violates Due Process

In this case, the specific facts of Mr. Muriel's case are compelling. He was convicted and subsequently deported based on a false presentation of facts. These facts were not corrected until over four years after his deportation. As a result, Mr. Muriel had no past opportunity to take appropriate measures to preserve his right to remain in the United States. In particular, he has never withstood removal proceedings with accurate criminal charges. He was rendered

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[2] In a decision rendered subsequent to the decision in this case, the United States Court of Appeals for the Fourth Circuit invalidated 8 C.F.R. §1003.2(d), the regulation banning post-departure motions to reopen before the Board of Immigration Appeals (the regulation at issue in this case, 8 C.F.R. §1003.23(b)(1), is a parallel regulation banning post-departure motions to reopen before an Immigration Judge; the language of the post-departure bar in both provisions is identical). The Fourth Circuit held that the regulation conflicted with the language of the statute governing motions to reopen, 8 U.SC. §1229(a)(c)(7)(A), as enacted by IIRIRA. That statute codified the regulations pertaining to motions to reopen, and did not include the post-departure bar in its codification. Thus, the Fourth Circuit held the regulation is invalid under step one of the Chevron analysis. See William v. Gonzales, 499 F.3d 329 (4th Cir. 2007).

In his petition for rehearing, Mr. Muriel raised the William decision and arguments supporting it. In the denial of the petition for rehearing, the First Circuit refused to address the argument on the ground that it was not raised in the original petition. See Pena-Muriel v. Gonzales, 510 F.3d 350 (1st Cir. 2007).

defenseless because of an unlawful criminal conviction. His present claim is to correct a clear injustice that was not remediable prior to his removal from the United States.

As a lawful permanent resident, Mr. Muriel is protected by the United States Constitution. See The Japanese Immigrant Case, 189 U.S. 86, 100-101 (1903) (alien has due process rights). His long-term residency and family ties to the United States heighten this protection. See Landon v. Plascencia, 459 U.S. 21, 32 (1982) (once an alien is admitted and develops ties that go with permanent residence his constitutional status changes accordingly). Mr. Muriel's constitutional rights are not minimized because he has suffered an unlawful conviction and baseless deportation. He continues to endure the prohibition against his return to the United States and the painful separation from his child and family. There are no grounds for his deportation and there is no basis for his continued unlawful exclusion from the United States.

The Due Process Clause of the Fifth Amendment provides that "No person shall ... be deprived of ...liberty without due process of law. This right to liberty is a fundamental interest." See Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action"). Mr. Muriel is actively restrained from maintaining his status as a lawful permanent resident, despite the fact that there was no basis for his removal. He sought to reopen his case to establish that his removal was unwarranted and illegal, and to demonstrate that there are no lawful

reasons that prevent his re-entry into the United States, so that he may rejoin his family and continue his permanent residency. This action is arbitrary and constitutes a due process violation.

Mr. Muriel is entitled to procedural due process measured by balancing: (1) his private interest affected by the government; (2) the risk the government will erroneously deprive him of that interest, and the value of additional or substitute procedural safeguards to prevent that from happening; and (3) the government's interest, including the fiscal and administrative burdens the additional or substitute procedural safeguards would impose. See Matthews v. Eldridge, 424 U.S. 319, 335 (1976). Mr. Muriel has been wrongfully stripped of his United States residency. This punishment has been characterized as a "sanction which in severity surpasses all but the most Draconian criminal penalties," Lok v. INS, 548 F2d 37 (2nd Cir. 1977), which "may result in the loss of 'all that makes life worth living'." Bridges v. Wixon, 326 U.S. 135, 147, 65 S.Ct. 1443 (1945) (quoting Ng Pho Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492 (1922)). The government has already erroneously deprived Mr. Muriel of his right to reside in the United States and he is further prevented from returning because of criminal penalties associated with an unlawful return. Therefore, the severity of his plight stems from the violation of the procedural safeguards of the Constitution.

This Court should note that the only expense to the government in this case would consist of an Immigration Judge making a routine administrative review of the case in order to determine the validity of

Mr. Muriel's removal order. As discussed *supra*, it is well-established that where a conviction is vacated, there is an appropriate basis for reopening deportation proceedings. See DeFaria v. INS, 13 F.2d 422, 423 (1st Cir. 1993). A vacated conviction will be recognized for immigration purposes if it is not pursuant to an expungement or rehabilitative statute, see Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378 (BIA 2000), and if the vacatur was not solely for immigration purposes. See Matter of Pickering, 23 I&N Dec. 621 (BIA 2003). Here, the vacatur occurred because a fraud had been committed on the Court arising out of false allegations. This analysis is within the expertise of the Immigration Judge and is a task that the judge performs many times daily. The government will not be affected adversely by re-hearing this case. The slight allocation of resources necessary for this task is greatly outweighed by the irreparable harm that Mr. Muriel is suffering because of his unlawful deportation.

It is no answer to say, as the First Circuit did in its decision below, that Mr. Muriel's "removal proceeding came to a lawful conclusion before his conviction was vacated." 489 F.3d at 443. Nor does the fact that his motion to reopen was filed some years after his removal proceedings concluded; the fraud underlying the conviction simply did not come to light until that time, and he promptly vacated the conviction and sought reopening. While the goal of finality is a legitimate one, it cannot trump that of due process; a deportation which is based on a fraudulent, now-vacated conviction is repugnant to due process values.

Mr. Muriel's case represents a unique situation and requires the consideration of practical realities and due process concerns. Mr. Muriel's conviction has been vacated, but he still suffers from the penalty imposed as a result of that fraudulently obtained conviction. Due process requires that the penalty be lifted in keeping with the revelation of Mr. Muriel's innocence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

Fredy Hugo Pena-Muriel
By His Attorney,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-1937

[Filed June 13, 2007]

FREDY HUGO PENA-MURIEL,	)
Petitioner,	)
	)
v.	)
	)
ALBERTO GONZALES,	)
ATTORNEY GENERAL,	)
Respondent.	)
	)

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before

Boudin, *Chief Judge*,
Campbell, *Senior Circuit Judge*,
and Lipez, *Circuit Judge*.

Ronald Olen, for petitioner.

Papu Sandhu, Senior Litigation Counsel, *Michael J. Sullivan*, U.S. Attorney, *Frank Crowley*, Special

Assistant U.S. Attorney, *Peter D. Keisler*, Assistant Attorney General, and *David M. McConnell*, Deputy Director, on brief for respondent.

LIPEZ, *Circuit Judge.* Noting that a court has now vacated the criminal conviction on which his removal proceedings were premised, Fredy Hugo Pena-Muriel asks us to vacate the Bureau of Immigration Appeals' ("BIA") decision refusing to reopen his removal proceedings. Pena-Muriel argues that a change in immigration law or, alternatively, principles of due process require such a reopening, even though he left the country before he petitioned the government to reopen his deportation proceedings. We reject his arguments and deny the petition for review.

I.

Pena-Muriel, a native and citizen of Bolivia, was admitted to the United States in 1970, when he was less than two years old. After residing in the United States as a lawful permanent resident for twenty-seven years, Pena-Muriel was convicted of domestic assault in February 1997 under R.I. Gen. Laws §§ 11-5-3 and 12-29-5; he received a one-year suspended sentence and probation. As a result of his conviction, Pena-Muriel was placed in removal proceedings. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (providing for deportation of aliens convicted of an aggravated felony); and *id.* § 1227(a)(2)(E)(i) (same for crimes of domestic violence). An Immigration Judge ("IJ") ordered Pena-Muriel removed to Bolivia in August 1997. Pena-Muriel neither applied for relief from the order nor appealed the IJ's decision. He subsequently left the United States.

In March 2002, Pena-Muriel's Rhode Island conviction was vacated on the basis of an affidavit from the victim stating that Pena-Muriel "should not have been charged" without further elaboration. The victim simply said: "I am not at liberty to explain why." Shortly thereafter – but roughly five years after his departure from the United States – Pena-Muriel moved to reopen his removal proceedings based on the vacatur of his conviction. The IJ denied the motion to reopen, citing 8 C.F.R. § 3.23(b)(1) (now designated at 8 C.F.R. § 1003.23(b)(1)), which states: "A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings *subsequent to his or her departure from the United States*." (emphasis added). The BIA summarily affirmed the IJ's decision in February 2003.

Months later, Pena-Muriel filed a petition for a writ of habeas corpus in the District of Massachusetts. Upon the government's motion, the case was transferred to the First Circuit as a petition for review pursuant to section 106(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231. *See Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) ("Section 106 of the REAL ID Act amended 8 U.S.C. § 1252(a) so that a petition for review filed with the appropriate court is now an alien's exclusive means of review of a removal order. While limiting the avenues of judicial review, the REAL ID Act expanded courts of appeals' jurisdiction to consider constitutional and legal questions presented in a petition for review. § 1252(a)(2)(D). Congress believed that '[b]y placing all review in the courts of appeals, [the REAL ID Act] would provide an 'adequate and effective' alternative

to habeas corpus.'" (quoting 151 Cong. Rec. H2813-01) (citation omitted)).

Pena-Muriel now argues that Congress abrogated the regulation precluding consideration of a motion to reopen after an alien has departed the country when it passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.). IIRIRA amended the Immigration and Naturalization Act ("INA"), in relevant part, by removing 8 U.S.C. § 1105a(c) (1994) (repealed 1996), which stated: "An order of deportation . . . shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order." Describing 8 C.F.R. § 1003.23(b)(1) as "linked" to this statutory provision, Pena-Muriel argues that the deletion of § 1105a(c) invalidated the regulation. Alternatively, Pena-Muriel argues that allowing his deportability to be premised on a vacated conviction violates his Fifth Amendment due process rights.

II.

A. The Statutory Claim

The premise of Pena-Muriel's statutory claim – that the regulation on which the BIA based its dismissal was inextricably linked to the language of the superseded statute – is wrong. At the time the regulation was adopted, there was no statutory authority for a motion to reopen. *See INS v. Doherty*,

502 U.S. 314, 322 (1992).[1] Instead, the regulation arose from the Attorney General's broad discretion to regulate relief from deportation orders. *See Goncalves v. INS*, 6 F.3d 830, 832 (1st Cir. 1993) (recognizing that "Congress intended the Attorney General to have considerable leeway in working out the precise procedures for determining contested issues related to deportation and 'discretionary relief'"). The Attorney General's authority to prohibit consideration of motions to reopen from aliens who have departed the United States did not originally depend upon the statutory language in § 1105a(c). Thus, the removal of that statutory language by IIRIRA does not abrogate the Attorney General's authority to continue to enforce the limitations of 8 C.F.R. § 1003.23(b)(1).

Pena-Muriel also argues that, by deleting the language of § 1105a(c), Congress signaled its intent that the Attorney General should no longer enforce 8 C.F.R. § 1003.23(b)(1). The Attorney General counters that the statutory change signals no such intention. The parties point to no statutory language that explicitly addresses the issue. As the Supreme Court has stated, where a statute is silent or ambiguous on the issue at hand, we must "defer to a reasonable construction by the agency charged with its implementation." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)).

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[1] With IIRIRA's enactment, motions to reopen were transformed from a regulatory to a statutory form of relief. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1283-84 (9th Cir. 2005) (discussing IIRIRA's codification of the reopening procedure).

In challenging the reasonableness of the Attorney General's interpretation of the INA amendments as they relate to the reopening issue, Pena-Muriel cites due process concerns expressed during testimony before the House Judiciary Committee preceding IIRIRA's passage:

> The administration is committed to ensuring that aliens in deportation proceedings are afforded appropriate due process; however, the availability of multiple layers of judicial review has frustrated the timely removal of deportable aliens.

Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 104th Cong. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service). Pena-Muriel argues that Congress, motivated by due process concerns to reinstate judicial review despite an alien's departure, would be similarly motivated to permit motions to reopen administrative proceedings by persons subject to removal, deportation, or exclusion proceedings after they have left the country.

Pena-Muriel misunderstands the context of the due process concerns expressed in the congressional testimony. Prior to IIRIRA, "an alien seeking review of a deportation order was entitled to an automatic stay pending the completion of that review." *Arevalo v. Ashcroft*, 344 F.3d 1, 6 (1st Cir. 2003). IIRIRA "altered that paradigm," instead "requir[ing] a review-seeker to ask the reviewing court for a stay of removal," *id.*, and raising the standards that must be met in order to

receive such a stay. *See Reno v. American-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 475 (1999) (noting that IIRIRA "repealed the old judicial-review scheme set forth in § 1105a and instituted a new []and significantly more restrictive[] one"). Because this change would result in the deportation of many aliens while they were awaiting judicial review, Congress amended the INA to allow these aliens to continue litigating their appeals from abroad. *See Tapia Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001) (recognizing, in this limited context, that "deportation no longer forecloses judicial review").

Understood against this background, the testimony cited by Pena-Muriel does not advance his position. Indeed, the concern expressed about "multiple layers of judicial review" reflects an intent to reinforce the finality of removal decisions. With the amendments to the INA, Congress allowed post-departure appeals of the BIA's original order of deportation, thereby protecting the alien's first opportunity to challenge a deportation order in court. That change does not remotely support an argument that Congress also intended, implicitly, to allow post-departure petitions to reopen a closed administrative proceeding.

The government also points out that IIRIRA enacted strict time limits for the filing of motions to reopen and limited aliens to a single filing. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1286 (9th Cir. 2005) (noting that before IIRIRA "motions to reopen were never time-barred"); *Sidikhouya v. Gonzales*, 407 F.3d 950, 951-52 (8th Cir. 2005) (explaining that IIRIRA allows aliens to file a "single motion to reopen at the conclusion of removal proceedings"). Yet, Congress

remained silent regarding the long-standing regulatory bar imposed by 8 C.F.R. § 1003.23(b)(1). Citing Supreme Court precedent, the government argues that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commod. Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). The government's insistence that the Attorney General's interpretation was the one intended by Congress may be overreaching. Nevertheless, this precedent supports the reasonableness of the Attorney General's interpretation of the effect of the statutory change on the regulatory bar imposed by 8 C.F.R. § 1003.23(b)(1) on motions to reopen.

B. The Due Process Claim

Pena-Muriel argues that allowing his deportation order to stand on the basis of a criminal conviction that has since been vacated violates his constitutional right to due process. We disagree.

Pena-Muriel cites a variety of cases for the principle that "the overturning of a conviction upon which deportability was premised is an appropriate basis for reopening administrative proceedings." *De Faria v. INS*, 13 F.3d 422, 423 (1st Cir. 1993); *see also Alim v. Gonzales*, 446 F.3d 1239, 1249-50 (11th Cir. 2006); *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1128-29 (10th Cir. 2005). However, the fact that a vacatur may be an "appropriate" basis for reopening a deportation

order does not establish a due process right to such reopening after one has departed the country.[2]

It is well-established that aliens are entitled to due process in deportation proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993); *Choeum v. INS*, 129 F.3d 29, 38 (1st Cir. 1997). In this context, due process requires that the alien receive notice of the charges against him, and a fair opportunity to be heard before an executive or administrative tribunal. *Choeum*, 129 F.3d at 38. Pena-Muriel received due process in his deportation proceedings. At the time of his departure, Pena-Muriel had been convicted of crimes triggering deportation provisions. His removal proceeding came to a lawful conclusion before his conviction was vacated. With the benefit of appropriate notice, he received a hearing before an IJ and the opportunity for an administrative appeal to the BIA. He waived an appeal to the BIA after he was ordered removed. He made no attempt to vacate his conviction prior to his departure; and he voluntarily left the country. He makes no claim that the IJ's removal order in 1997 was invalid or constitutionally infirm.

Now Pena-Muriel seeks to reopen proceedings that ended roughly ten years ago, on the basis of a vacatur that occurred five years after he voluntarily removed himself from the country. Due process does not require continuous opportunities to attack executed removal

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[2] In addition, Pena-Muriel's situation is distinguishable from these cases because each of them involved convictions that were vacated before the removal proceedings had terminated and while each petitioner remained in the country.

orders years beyond an alien's departure from the country. Indeed, there is a strong public interest in bringing finality to the deportation process. *See Baez v. INS*, 41 F.3d 19, 24 (1st Cir. 1994) (noting "Congress's intention to eliminate excessive appeals and lend finality to the deportation process").

III.

For the foregoing reasons, we deny the petition for review.

So ordered.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A30-663-990 - Boston

Date: FEB 6, 2003

In re: PENA-MURIEL, FREDY HUGO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Watt Jr., Robert D., Esquire

ORDER:

PER CURIAM: The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

/s/
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

[Dated: June 29, 2002]

[File: A30 663 990]

In the Matter of	)
	)
Fredy Hugo PENA-MURIEL,	)
Respondent.	)
	)

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(E)(i) of the Immigration and Nationality Act ("the Act") [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of a Crime of Domestic Violence, a Crime of Stalking, or a Crime of Child Abuse, Child Neglect, or Child Abandonment

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT
Robert D. Watt, Jr.
84 Ship Street
Providence, RI 02903

ON BEHALF OF SERVICE:
Assistant District Counsel
Trial Attorney Unit - INS
JFK Federal Bldg., Rm. 425
Boston, Massachusetts 02203

DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

On July 17, 1997, the Immigration and Naturalization Service ("the Service") personally served Respondent with a Notice to Appear ("NTA"). *See* Exhibit 1. In the NTA, the Service alleged that Respondent, a native and citizen of Bolivia, was admitted to the United States at or near Miami, Florida on or about September 27, 1970 as an immigrant. *See id.* The Service further alleged that on February 19, 1997, Respondent was convicted in Providence District Court, Providence, Rhode Island for the offense of Domestic Assault in violation of R.I. Gen. Laws §§ 11-5-3, 12-29-5. *See id.* For this offense, Respondent received a one year suspended sentence. *See id.* Accordingly, the Service charged Respondent with being removable pursuant to section 237(a)(2)(E)(i) of the Act. *See id.*

The Court held master calender hearings on July 31, 1997 and August 14, 1997. At the hearing on August 14, 1997, Respondent submitted written

pleadings in which he admitted factual allegations #1-5 contained in the NTA, conceded removability as charged, designated Bolivia as the country for deportation purposes, and requested time to appeal his state criminal conviction. *See* Exhibit 2. As evidence of Respondent's removability, the Service presented the Court with a certified copy of Respondent's criminal record. *See* Exhibit 3. Based on Respondent's admissions, the Court ordered Respondent be removed to Bolivia. No appeal has ever been filed in this case.

On May 16, 2002, Respondent, through counsel, filed a motion to reopen his removal proceedings. In his motion, Respondent asserts that the Domestic Assault conviction that served as the basis for removability has been vacated and dismissed.[1] As such, Respondent requests that the Court reopen his removal proceedings and rescind the order of removal.

As of the date of this decision, the Service has not filed a response to Respondent's motion to reopen. Therefore, Respondent's motion will be deemed unopposed. *See* 8 C.F.R. § 3.32(b)(1)(iv)(2002); Local Operating Procedure # 3.4.

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[1] In support of his motion, Respondent submitted certified copies of the following documents: (1) Order of the District Court, Sixth Division, State of Rhode Island vacating Respondent's pleas of nolo contendre; (2) Dismissal by Prosecution; and (3) Affidavit of Respondent's girlfriend, the alleged victim of the Domestic Assault offense.

II. Law

The Court may reopen a case unless jurisdiction is vested with the Board of Immigration Appeals. 8 C.F.R. § 3.23(b)(1) (2002). A motion to reopen must be filed within 90 days of the date of entry of the final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. 8 C.F.R. § 3.23(b)(1); INA § 240(d)(6)(C)(2002). A motion to reopen shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. 8 C.F.R. § 3.23(b)(1).

III. Analysis

In the motion to reopen, Respondent's counsel states that Respondent is not currently residing in the United States. Given that Respondent departed the United States after he was ordered removed, the Court no longer has jurisdiction to consider motions to reopen made on his behalf. *See* 8 C.F.R. § 3.23(b)(1).

ORDER

IT IS ORDERED that Respondent's Motion to Reopen removal proceedings be, and the same is hereby DENIED FOR LACK OF JURISDICTION.

6/29/02
Date

/s/
WILLIAM P. JOYCE
United States Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 05-1937

[Filed October 24, 2007]

FREDY HUGO PENA-MURIEL, Petitioner,	)
v.	)
ALBERTO GONZALES, ATTORNEY GENERAL, Respondent.	)

Before Boudin, Chief Judge, Campbell, Senior Circuit Judge, and Lipez, Circuit Judge.

ORDER OF THE COURT

In this petition for panel rehearing, petitioner argues for the first time that the text of 8 U.S.C. § 1229a(c)(7)(A), a provision added to the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, which states that "[a]n alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen

described in subparagraph (C)(iv)," unambiguously provides an alien the right file a motion to reopen either from within the United States or abroad.

When this case was presented to the panel, petitioner presented only one statutory argument, asserting that Congress's deletion of 8 U.S.C. § 1105a(c) when passing IIRIRA removed the statutory foundation for the regulation barring motions to reopen from being filed outside of the United States, 8 C.F.R. § 1003.23(b)(1). We rejected this argument. Not having been asked to do so, we did not decide whether 8 C.F.R. § 1003.23(b)(1). We rejected this argument. Not having been asked to do so, we did not decide whether 8 C.F.R. § 1003.23(b)(1) conflicts with 8 U.S.C. § 1229a(c)(7). We will not address that issue now on rehearing. *See American Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1264 (1st Cir. 1993) ("[A] party may not raise new and additional matters for the first time in a petition for rehearing.").

The petition for panel rehearing is denied.

By the Court:

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 05-1937

[Entered October 24, 2007]

FREDY HUGO PENA-MURIEL,
Petitioner,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL,
Respondent.

Before Boudin, Chief Judge, Torruella, Lynch, Lipez and Howard, Circuit Judges.

ORDER OF THE COURT

The petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing en banc be denied.

By the Court:

95

(2)

No. 07-1221

In the Supreme Court of the United States

FREDY HUGO PENA-MURIEL, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GREGORY G. KATSAS
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QUESTION PRESENTED

Section 1003.23(b)(1) of Title 8, Code of Federal Regulations, provides that an administrative motion to reopen "shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States." The question presented is whether the Board of Immigration Appeals erred in relying on that regulation in denying reopening in petitioner's case.

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In the Supreme Court of the United States

No. 07-1221

FREDY HUGO PENA-MURIEL, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 489 F.3d 438. The decisions of the Board of Immigration Appeals (Pet. App. 11a) and the immigration judge (Pet. App. 12a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2007. A petition for rehearing was denied on October 24, 2007. On January 9, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including March 22, 2008 (Saturday), and the petition was filed on March 24, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101 *et seq.*, as amended, and the Attorney General's regulations implementing it permit an alien to file a motion to reopen proceedings after a final decision has been rendered by an immigration judge (IJ) or the Board of Immigration Appeals (BIA or Board). See 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); 8 C.F.R. 1003.23(b)(3) (IJ); 8 C.F.R. 1003.2(c) (BIA). The purpose of a motion to reopen is to present "new facts" that may bear on an alien's eligibility for relief. 8 U.S.C. 1229a(c)(7)(B) (Supp. V 2005); see 8 C.F.R. 1003.2(c)(1).

Until 1996, motions to reopen were entirely a creature of the Attorney General's regulations. See *Dada* v. *Mukasey*, No. 06-1181 (June 16, 2008), slip op. 9-11. In 1952, shortly after the INA was first enacted, the Attorney General proposed, see 17 Fed. Reg. 9989, 9995, and then promulgated, see *id.* at 11,475, 11,476, a regulation regarding the effect of an alien's departure from the United States on the alien's ability to file a motion to reopen. That regulation stated: "A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States." *Id.* at 11,475 (8 C.F.R. 6.2). The rule that an alien who has departed from the United States may not obtain adjudication of a motion to reopen has been reflected in the Attorney General's regulations ever since. It is presently codified at 8 C.F.R. 1003.23(b)(1) with respect to motions to reopen that are filed with an IJ, and at 8 C.F.R. 1003.2(d)(1) with respect to motions to reopen filed with the BIA.

In 1990, Congress directed the Attorney General to place limits on the number of motions to reopen an alien

could file, specify a maximum time period for filing such motions, and submit a report concerning "abuses associated with the failure of aliens to consolidate requests for discretionary relief before immigration judges at the first hearing on the merits." Immigration Act of 1990, Pub. L. No. 101-649, § 545(c), 104 Stat. 5066. Regulations implementing those directives were proposed in 1994, see 59 Fed. Reg. 29,386, and again in 1995, see 60 Fed. Reg. 24,574 (extending the filing period from 20 days to 90 days), and were promulgated in final form on April 29, 1996, see 61 Fed. Reg. 18,900.

On September 30, 1996, Congress enacted the present statutory time and numerical limits on motions to reopen. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a), 110 Stat. 3009-593. IIRIRA expressly codified several features of the Attorney General's recently promulgated regulations, including the rules that an alien may generally file "one motion to reopen" and that any such motion must generally be filed within 90 days following the entry of a final order of removal. Compare IIRIRA § 304(a), 110 Stat. 3009-593 (8 U.S.C. 1229a(c)(7)(A) and (C)(i) (Supp. V 2005)), with 8 C.F.R. 1003.23(b)(1).

In March 1997, the Attorney General promulgated regulations implementing IIRIRA. 62 Fed. Reg. 10,312. Between 1962 and IIRIRA's 1996 enactment, the INA had provided that an alien who had departed from the United States after the entry of a final order of removal could no longer seek judicial review of that order by way of a petition for judicial review or otherwise. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651 (8 U.S.C. 1105a(c) (1994)). Congress had repealed that provision when it enacted IIRIRA, see § 306(b), 110

Stat. 3009-612, see also *Dada*, slip. op. 20, and the Attorney General had received comments arguing that, as a result, the longstanding regulations regarding an alien's ability to file a post-departure administrative motion to reopen were "no longer valid." 62 Fed. Reg. at 10,321; see *ibid.* (observing that commentators had argued that permitting aliens to file post-departure motions to reopen would "promote judicial efficiency and economy").

The Attorney General specifically rejected those contentions. The Attorney General observed that "[n]o provision" of IIRIRA "supports reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States." 62 Fed. Reg. at 10,321. The Attorney General also stated "that the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages this system might render." *Ibid.*

2. Petitioner was admitted to the United States as an immigrant in 1970. Pet. App. 2a. In 1997, he was convicted of domestic assault in Rhode Island state court, and an IJ ordered him removed to Bolivia. *Ibid.* Petitioner did not appeal the IJ's decision to the BIA, and he left the United States at some point thereafter. *Ibid.*; see Pet. 6 (stating that petitioner "did depart the United States [following the 1997 removal order], and has been living abroad since that time"). In 2002, petitioner's 1997 conviction was vacated after the victim filed an affidavit stating that petitioner "should not have been charged," but that "I am not at liberty to explain why." Pet. App. 3a.

3. On May 16, 2002, petitioner filed a motion to reopen his removal proceedings. Pet. App. 14a. The IJ

denied that motion, citing the Attorney General's regulation providing that an alien may not file a motion to reopen with an IJ after departing from the United States. *Ibid.* On February 6, 2003, the BIA adopted and summarily affirmed the IJ's decision. *Id.* at 11a.

4. Petitioner filed a petition for a writ of habeas corpus in the District of Massachusetts. Pet. App. 3a. On May 11, 2005, the President signed into law the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which eliminated habeas corpus jurisdiction to review orders of removal, and prescribes, subject to one exception not at issue here, that "the sole and exclusive means for judicial review of an order of removal" is by way of a petition for review in the appropriate court of appeals. § 106(a)(1), 119 Stat. 310 (8 U.S.C. 1252(a)(5) (Supp. V 2005)). The government moved to transfer the case to the United States Court of Appeals for the First Circuit pursuant to Section 106(c) of the REAL ID Act, see 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)), and the district court granted the motion. Pet. App. 3a.

5. The court of appeals denied the petition for review. Pet. App. 1a-10a. It first rejected petitioner's contention that the regulation on which the IJ had relied "was inextricably linked to" the statutory provision that had, pre-IIRIRA, barred aliens who had departed the United States from filing a petition for judicial review. *Id.* at 4a (citing 8 U.S.C. 1105a(c) (1994)). The court of appeals explained that because "[t]he Attorney General's authority to prohibit consideration of motions to reopen from aliens who have departed the United States did not originally depend on" that statute, its repeal "d[id] not abrogate the Attorney General's authority to continue to enforce the" regulation. *Id.* at 5a.

The court also rejected petitioner's assertion that Congress's repeal of former Section 1105a(c) "signaled its intent that the Attorney General should no longer enforce" the regulation at issue here. Pet. App. 5a. It noted that petitioner had identified "no statutory language that explicitly addresses the issue," and stated that, as a result, "we must 'defer to a reasonable construction by the agency charged with [the INA's] implementation.'" *Ibid.* (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003)). The court determined that petitioner had "misunderst[ood] * * * the due process concerns expressed in the congressional testimony" by a former General Counsel of the Immigration and Nationalization Service (INS), *id.* at 6a, and stated that the changes made to petition-for-review practice by IIRIRA did "not remotely support an argument that Congress also intended, implicitly, to allow post-departure petitions to reopen a closed administrative proceeding," *id.* at 7a. The court further noted that although "IIRIRA enacted strict time limits for the filing of motions to reopen and limited aliens to a single filing, * * * Congress remained silent regarding the long-standing regulatory bar" against filing motions to reopen after departing from the United States. *Id.* at 7a-8a.

Finally, the court of appeals rejected petitioner's contention "that allowing his deportation order to stand on the basis of a criminal conviction that has since been vacated violates his constitutional right to due process." Pet. App. 8a. The court noted that it and other courts of appeals had stated that "the overturning of a conviction upon which deportability was premised is an appropriate basis for reopening administrative proceedings." *Ibid.* (quoting *De Faria* v. *INS*, 13 F.3d 422, 423 (1st Cir. 1993) (per curiam)). But the court of appeals empha-

sized that "the fact that a vacatur may be an 'appropriate' basis for reopening a deportation order does not establish a due process right to such reopening after one has departed the country," *id.* at 8a-9a, and it noted that all of the decisions cited by petitioner had "involved convictions that were vacated before the removal proceedings had terminated and while [the alien] remained in the country," *id.* at 9a n.2.

The court of appeals acknowledged "that aliens are entitled to due process in deportation proceedings," including "notice of the charges against [them], and a fair opportunity to be heard before an executive or administrative tribunal." Pet. App. 9a. But it observed that petitioner "had been convicted of crimes triggering deportation proceedings" at the time of his removal proceedings, and that he had "made no attempt to vacate his conviction prior to his departure" from the United States. *Ibid.* The court stated that due process "does not require continuous opportunities to attack executed removal orders years beyond an alien's departure from the country," particularly in light of the "strong public interest in bringing finality to the deportation proceedings." *Id.* at 9a-10a.

6. Petitioner filed a petition for panel rehearing, which the court of appeals denied. Pet. App. 16a-17a. In that petition, petitioner argued for the first time that 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005)—which was added to the INA by IIRIRA and states that "[a]n alien may file one motion to reopen proceedings under this section"—"unambiguously provides an alien the right [to] file a motion to reopen either from within the United States or abroad." Pet. App. 17a. The court of appeals stated that the panel had "not decide[d] whether 8 C.F.R. § 1003.23(b)(1) conflicts with" that statute be-

cause it had "[n]ot * * * been asked to do so," and it refused to "address that issue now on rehearing." *Id.* at 17a.

ARGUMENT

The petition for a writ of certiorari seeks review of three overlapping questions. First, petitioner contends (Pet. 7-13) that the subsequent vacatur of the criminal conviction upon which the final order of removal in his case was based requires that his removal proceeding be reopened. Second, petitioner asserts (Pet. 13-18) that the 1996 repeal of the statutory provision that formerly barred aliens from filing a petition for judicial review while outside the United States renders invalid the Attorney General's longstanding regulations that bar an alien who has departed from the United States from filing an administrative motion to reopen.[1] Third, petitioner argues (Pet. 18-22) that the failure to grant reopening in his particular case violates the Due Process Clause.

The court of appeals' decision is correct and does not conflict with the decisions of any other court of appeals. In addition, petitioner's motion to reopen would also fail for the wholly separate reason that it was untimely under both the INA and the Attorney General's regulations. Further review is not warranted.

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[1] As petitioner observes, the Fourth Circuit has held that the regulation barring post-departure motions to reopen is invalid because it conflicts with 8 U.S.C. 1229a(c)(7)(A) (Supp. V 2005), which provides that "[a]n alien may file one motion to reopen proceedings under this section." Pet. 18 n.2 (citing *Williams* v. *Gonzales*, 499 F.3d 329 (4th Cir. 2007)). The court of appeals expressly declined to consider that argument because petitioner never advanced it until his petition for rehearing. See *id.* at 18a.

1. a. Petitioner's first contention (Pet. 7-13) is that the vacatur of his 1997 conviction requires that his removal proceedings be reopened. The petition for a writ of certiorari does not identify the precise basis for that claim, or even whether it is constitutional or statutory in nature. Before the court of appeals, however, petitioner expressly cast the claim as a constitutional one, see Pet. C.A. Br. 2 (stating that "Because [Petitioner's] Conviction Has Been Vacated on the Merits, Due Process Requires That it No Longer Serve as the Basis For Removal"), and the court of appeals understood and resolved it in those terms. See Pet. App. 8a-9a.

As he did before the court of appeals (see Pet. App. 8a), petitioner cites a number of court of appeals and BIA decisions that state that "the overturning of a conviction upon which deportability was premised is an appropriate basis for reopening administrative proceedings." Pet. 7 (quoting *De Faria* v. *INS*, 13 F.3d 422, 423 (1st Cir. 1993) (per curiam)); see Pet. 7-10. But petitioner makes no attempt to refute the court of appeals' response that "the fact that a vacatur may be an 'appropriate' basis for reopening a deportation order does not establish a due process right to such reopening after one has departed the country." Pet. App. 8a-9a. Nor does petitioner deny that all of the decisions upon which he relied below "involved convictions that were vacated before the removal proceedings had terminated and while [the alien] remained in the country." *Id.* at 9a n.2.

b. In this Court, petitioner also cites a number of decisions in which the Ninth Circuit has held that the Attorney General's regulations do not deprive an IJ or the Board of authority to consider a motion to reopen filed by an alien who was removed from the United States as a result of a criminal conviction that was sub-

sequently vacated. See Pet. 10-13 (citing *Cardoso-Tlaseca* v. *Gonzales*, 460 F.3d 1102 (2006), *Wiedersperg* v. *INS*, 896 F.2d 1179 (1990), and *Estrada-Rosales* v. *INS*, 645 F.2d 819 (1981)). Those decisions, however, involved the proper interpretation of the relevant regulations, rather than their validity. See *Cardoso-Tlaseca*, 460 F.3d at 1106 n.2 ("Because we hold that the BIA made a legal error when it determined that the regulation barred [the alien's] motion to reopen[,] * * * we do not decide the issue of the regulation's validity."); see also *Estrada-Rosales*, 645 F.2d at 820-821 (concluding that the term "departed" in the regulations is properly understood to be "a 'legally executed' departure when effected by the government," and holding that "a deportion based upon an invalid conviction is * * * not 'legally executed'"); accord *Wiedersperg*, 896 F.2d at 1181-1182 (same). In the court of appeals, petitioner did not seek relief on the ground that the BIA had misapplied the Attorney General's regulations in denying his motion to reopen. Accordingly, he has forfeited any entitlement to seek reversal of the court of appeals' judgment on that ground.

In any event, petitioner's current motion falls squarely within the Attorney General's regulations. With respect to motions to reopen filed with an IJ, the regulations provide: "A motion to reopen * * * shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States." 8 C.F.R. 1003.23(b)(1); accord 8 C.F.R. 1003.2.(d) (similar rule for motions to reopen filed with the BIA). Because petitioner's motion expressly acknowledged that he was not currently in the United

States, the IJ correctly concluded that it lacked authority to consider it. Pet. App. 15a.

Finally, there is no conflict between the Ninth Circuit decisions cited above and the decision of the court below. The theory underlying the Ninth Circuit decisions is that an alien who has been physically removed from the United States by an act of the government has not made a "departure" unless that removal was "legally executed." See *Estrada-Rosales*, 645 F.2d at 820; accord *Mendez* v. *INS*, 563 F.2d 956, 958-959 (9th Cir. 1977) (explaining, in the course of adopting a similar construction of the term "departed" in former 8 U.S.C. 1105a(c) (1976), that a contrary interpretation would "thwart the jurisdiction of this court in a case where the alien had been 'kidnaped' and removed").[2] Here, in contrast, petitioner left the United States on his own initiative. After the IJ ordered him removed, petitioner could have—but did not—seek further review or a stay of that order, first from the BIA and then from the appropriate court of appeals. Cf. *Cardoso-Tlaseca*, 460 F.3d at 1104 (noting that alien had "timely appealed" the IJ's order of removal to the BIA); *Wiedersperg*, 896 F.2d at 1180 (same); *Estrada-Rosales*, 645 F.2d at 820 (stating that the alien had been deported "after * * * unsuccessfully attempt[ing] to obtain a stay"). Nor did petitioner—again, unlike the aliens in all of the Ninth Circuit decisions upon which he relies—seek to vacate his

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[2] In addition to *Mendez*, petitioner cites a variety of other pre-IIRIRA decisions that involved whether there were circumstances in which an alien who was no longer physically present in the United States could file a petition for judicial review notwithstanding former 8 U.S.C. 1105a(c) (1976). See Pet. 10-11. That issue is not presented here. And because Section 1105a(c) was repealed in 1996, it lacks any prospective significance as well.

criminal conviction at any point before his departure from the United States. See *Cardoso-Tlaseca*, 460 F.3d at 1104; *Wiedersperg*, 896 F.2d at 1180; *Estrada-Rosales*, 645 F.2d at 820. In fact, petitioner made no attempt to have his conviction vacated until March 2002, more than four years after the IJ ordered him removed.

2. Petitioner also renews his contention (Pet. 13-18) that the regulations barring a post-departure motion to reopen are no longer valid after the repeal of former 8 U.S.C. 1105a(c) (1994). The court of appeals correctly rejected that contention, and petitioner has not asserted that its holding on this point conflicts with the decisions of another court of appeals.

The Attorney General has been granted broad authority to interpret the INA and issue regulations to carry out his authority. See 8 U.S.C. 1103(a)(1) and (3), (g) (2000 & Supp. V. 2005). The rule that an alien who has departed from the United States may not pursue further administrative relief by way of a motion to reopen has been part of the Attorney General's regulations since 1952, nine years *before* the initial enactment of the now-repealed statute with which petitioner erroneously contends that the regulations are "inextricably linked" (Pet. 16). See pp. 2-4, *supra*.[3] Accordingly, "the removal of that statutory language by IIRIRA does not abrogate the Attorney General's authority to continue to

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[3] Petitioner errs in asserting (Pet. 16) that the regulations governing motions to reopen assumed their current language shortly after the enactment of the legislation that first enacted former 8 U.S.C. 1105a(c) (1994). To the contrary, the pertinent language of the redesignated regulation that took effect on January 22, 1962, is identical to that contained in the 1952 regulation. Compare 17 Fed. Reg. at 11,475, 11,476 (promulgating 8 C.F.R. 6.2), with 27 Fed. Reg. 96-97 (1962) (promulgating 8 C.F.R. 3.2).

enforce the limitations of 8 C.F.R. § 1003.23(b)(1)." Pet. App. 5a.

Petitioner contends that the Attorney General's decision to retain the regulations following IIRIRA's enactment is inconsistent with Congress's "overall goal of balancing more effective removal procedures with the demands of due process." Pet. 14; see Pet. 15, 17-18. This Court, however, has held "that principles of *Chevron* deference are applicable to this statutory scheme." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Accordingly, because the INA itself does not speak directly to the question at hand, the only remaining question is whether the regulations are based "on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)).

The Attorney General's rule that an alien who has departed from the United States may not seek to reopen the removal proceeding that precipitated that departure is entirely reasonable. Its premise is that because the whole purpose of the administrative proceedings is to effect the alien's removal from the United States, those proceedings are properly deemed terminated if the alien departs.

Nor did the Attorney General act unreasonably in determining that Congress's decision in IIRIRA to repeal the statutory provision that had previously prevented aliens from pursuing petitions for judicial review from abroad did not require a change with respect to motions to reopen. As the court of appeals explained, the repeal of the petition-for-review provision was part and parcel of Congress's efforts to expedite the removal of removable aliens from the United States while still "protecting the alien's *first* opportunity to challenge a deportation order *in court*." Pet. App. 7a (emphases

added). But "[t]hat change does not remotely support an argument that Congress also intended, implicitly, to allow post-departure petitions to *reopen* a closed *administrative* proceeding," *ibid.*(emphases added), particularly in light of the "disfavor[]" in which such motions are held, *INS* v. *Doherty*, 502 U.S. 314, 323 (1992), and the longstanding nature of the Attorney General's contrary regulations, see *Stone* v. *INS*, 514 U.S. 386, 398 (1995) (stating that Congress is presumed to be aware of "the longstanding view[s] of the INS" when it makes amendments to the INA); *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (internal quotation marks and citations omitted)).[4]

3. Petitioner's final contention is that, in light of the "specific" (Pet. 18) and "unique" (Pet. 22) facts of his particular case, his continued exclusion from the United States violates the Due Process Clause. The court of appeals correctly rejected that factbound claim, and its

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[4] In *Dada* v. *Mukasey*, No. 06-1181 (June 16, 2008), the Court concluded that there was an "untenable conflict between" various statutory and regulatory provisions governing voluntary departure and motions to reopen, which it resolved by holding that "to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period." *Id.* at 18-19. Although the Court suggested that "[a] more expeditious solution [to that conflict] * * * might be to permit an alien who has departed the United States to pursue a motion to reopen," *id.* at 19-20, this case presents no conflict to resolve because petitioner neither sought nor was granted voluntary departure in connection with the 1997 removal order.

decision does not conflict with any decision of this Court or another court of appeals.

As the court of appeals explained (Pet. App. 9a), the Due Process Clause entitled petitioner to "notice of the charges against him, and a fair opportunity to be heard before an executive or administrative tribunal." Accord *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596-598 (1953). Petitioner was ordered removed after a hearing before an IJ, and he does not contend that there was anything procedurally defective about that hearing. Petitioner could have filed an administrative appeal to the BIA, but he failed to do so. Pet. App. 2a. As a result, the IJ's order automatically converted into a final order of removal, see 8 U.S.C. 1101(a)(47)(B)(ii), and petitioner lost his ability to seek judicial review in the appropriate court of appeals, see 8 U.S.C. 1252(d)(1) (stating that "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right"). Petitioner then chose to depart from the United States on his own accord and without seeking a stay of removal, and he did so despite the Attorney General's longstanding regulations providing that an alien who so departs may not file a later motion to reopen his removal proceedings. As the court of appeals correctly explained (Pet. App. 9a-10a), "[d]ue process does not require continuous opportunities to attack executed removal orders years beyond an alien's departure from the country." See *INS* v. *Abudu*, 485 U.S. 94, 107 (1988) (noting the "strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.").

4. There is an additional reason why further review is not warranted in this case. The INA provides that, subject to certain exceptions not at issue here, a motion to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005); accord 8 C.F.R. 1003.2(b)(1). Because petitioner did not appeal the IJ's August 14, 1997, decision to the BIA, see Pet. App. 13a-14a, that decision converted automatically into a final order of removal 30 days later, see 8 U.S.C. 1101(a)(47)(B)(ii); 8 C.F.R. 1003.3(a)(2). The motion to reopen at issue here was not filed until May 2002, more than four years after the expiration of the 90-day deadline for filing a motion to reopen. Pet. App. 14a. Although the court of appeals did not rely upon the untimeliness of petitioner's motion in denying the petition for judicial review, it provides an additional reason why the result in petitioner's case would be exceedingly unlikely to change even were this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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